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**IN THE
COURT OF APPEALS OF INDIANA**

PRISCILLA CESSNA,

Appellant-Plaintiff,

vs.

KENNETH E. BUHER and
JOAN BUHER,

Appellees-Defendants.

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No. 47A01-0603-CV-112

APPEAL FROM THE LAWRENCE SUPERIOR COURT
The Honorable R. Joseph Howell, Special Judge
Cause No. 47D01-9610-CP-804

MARCH 16, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

Appellant-Plaintiff Priscilla Cessna (“Cessna”) appeals from the trial court’s final judgment and decree in a dispute regarding an easement across her property exercised by Appellees-Defendants Kenneth E. and Joan Buher (collectively “the Buhers”). The trial court found and concluded that the Buhers have a prescriptive easement and an implied easement of necessity for the waterline at issue. The trial court denied Cessna’s request for permanent injunction and damages.

We affirm.

ISSUES

Restated, the issue presented by the parties is as follows: whether the trial court erred by finding and concluding that the Buhers acquired an easement for the waterline at issue.

FACTS AND PROCEDURAL HISTORY

The facts presented at trial established that on March 19, 1963, Harry B. and Hazel Smith (collectively “the Smiths”) deeded some real property in Lawrence County to Cessna and her husband, and a separate portion of real property to the Buhers, from a large parcel owned by the Smiths. Cessna and Joan Buher are Harry B. Smith’s daughters.¹ The property deeded to the Buhers adjoins the Cessna property on both the east and west sides.

¹ Hazel Smith was Priscilla Cessna and Joan Buher’s step-mother.

The Smiths shared a residence with the Buhers on the Buher property. The well used by the Smiths and the Buhers on the Buher property did not begin to meet the needs of the families. A deeper well could not be dug then or now.

Sometime in 1962, Smith decided to install a waterline in order to take advantage of water offered by a local public utility. The waterline began at a meter on what became the Buher property situated west of the Cessna property, ran across what became the Cessna property, and ended on what became the Buher property situated east of the Cessna property, at the residence shared by the Smiths and the Buhers. Cessna was aware of the waterline from 1963 to the present. That waterline is now the subject of this litigation.

Sometime between 1992 and 1994, the Buhers began to experience difficulties with the waterline, and determined that major repairs to the leaks in the waterline were necessary. Sometime in 1994, Kenneth Buher ordered approximately 3,000 feet of pipe to use to repair the existing waterline. The Buhers' son, Phil, had about 20 years of experience with waterline installation. Phil testified that over the course of approximately four days he would trench about 300 feet of property as close to the original waterline as possible, attach the new pipe at both ends to the original waterline, and then check to see if there were still major leaks in the waterline. Phil continued with that process trenching approximately 600 feet at a time, each time finding after connecting with the original waterline, that there were still major leaks in the line. Ultimately, new pipe was laid across the property.

The residence on the Cessna property burned down in 1972, and the property was last tilled sometime in the 1970s. The Cessna property is enrolled in the federal Conservation Reserve Program, a program that pays property owners to leave the property in its natural state. The Cessna property has sinkholes, is rough, and the prairie grass grows about three feet tall there.

On October 3, 1996, Cessna filed a complaint against the Buhers in which she sought compensation for damage allegedly sustained by her when she claims the Buhers trespassed on her real property and installed a different waterline across the property. In addition, Cessna sought the entry of a permanent injunction to prevent the Buhers from entering onto her property in the future.

On October 29, 1997, the Buhers filed their answer and affirmative defenses to Cessna's complaint. In addition they filed a counterclaim for declaratory judgment in which they sought acknowledgment of the existence of an easement in their favor for the waterline across Cessna's property, and the entry of a permanent injunction to prevent Cessna from interfering with the Buhers' easement.

On May 29, 2003, the trial court conducted a trial to resolve the issues in the complaint and counterclaim. The trial judge issued his findings of fact, conclusions of law, final judgment, final orders, and final decree on February 16, 2006. The trial court denied Cessna's request for damages and denied her request for a permanent injunction. The trial court granted the Buhers' request for a declaratory judgment acknowledging an easement for the waterline across Cessna's property. The trial court also granted the

Buhers' request for a permanent injunction to prevent Cessna from interfering with the Buhers' use, maintenance or repair of the easement. This appeal ensued.

DISCUSSION AND DECISION

STANDARD OF REVIEW

The trial court entered findings of fact and conclusions of law after the bench trial. A judgment entered after a bench trial will be clearly erroneous when there is no evidence supporting the findings or the findings fail to support the judgment, and/or when the trial court applies the wrong legal standard to properly found facts. *Fraley v. Minger*, 829 N.E.2d 476, 482 (Ind. 2005); Ind. Trial Rule 52(A). While the trial court's findings of fact with regard to claims that are tried to the bench are reviewed under the clearly erroneous standard, appellate courts do not defer to conclusions of law, which are reviewed de novo. *Id.* Where cases present mixed issues of fact and law, a review for an abuse of discretion is employed. *Id.* In the event the trial judge mischaracterizes findings as conclusions or vice versa, the appellate court looks past these labels to the substance of the judgment. *Id.* In order to reach the determination that a trial court's finding or conclusion is clearly erroneous, an appellate court's review of the evidence must leave it with the firm conviction that a mistake has been made. *Id.*

In the present case, while there certainly is significant evidence to establish the existence of a prescriptive easement, there also is some evidence on the issue of permission. Cessna testified that she "allowed them to put the first water line in." Appellant's App. p. 83. While we recognize the deference that is afforded the trial court on issues of fact and witness credibility, we choose to address the trial court's finding and

conclusion that the Buhers acquired an implied easement of necessity for the waterline across Cessna's property.

In order to establish the existence of an implied easement of necessity, a claimant must show that 1) there was common ownership at the time the estate was severed; 2) that the common owner's use of part of his land to benefit another part was apparent and continuous; 3) the land was transferred; and 4) at severance it was necessary to continue the preexisting use for the benefit of the dominant estate. *Reed v. Luzny*, 627 N.E.2d 1362, 1364 (Ind. Ct. App. 1994).

The Buhers moved into their residence in 1950. Smith moved in with them in 1951. The evidence presented at trial established that Smith owned all of the property prior to deeding the property to his daughters in March of 1963. Prior to dividing the property among his daughters in 1963, Smith decided to run a waterline from the Buhers' house across the Cessna property and onto the Buher property to the west of the Cessna property in order to connect to the City of Mitchell waterline. Joan Buher testified that they began installation of the original waterline in 1962, but that it was not completed until 1965. Cessna had seen the plans for the placement of the waterline prior to its installation. Cessna was aware of, and she did not object to, the original waterline that ran across her property.

The Buhers attempted to repair the waterline whenever there was a leak, and would walk the line to determine the existence of leaks. Cessna did not interfere with the Buhers' use and or repair of the waterline. The Buhers have used and maintained the waterline as the sole source of water for the residence for more than forty years. There

was testimony that the only reliable source of water to the Buher residence was the waterline installed in the 1960s, and that waterline continues to be the only reliable source of water to their property. There was testimony that a deeper well could not be dug in the 1960s and cannot be dug today.

The evidence in the record supports the trial court's findings. Furthermore, those findings support the trial court's conclusion that the Buhers' acquired an implied easement of necessity for the waterline. Therefore, we conclude that the trial court did not err.

We have previously held that owners of an easement possess all the rights incident to the enjoyment of the easement, including the right to make such repairs, improvements, or alterations as are reasonably necessary to make the grant of the easement effectual. *See Nodine v. McNerney*, 833 N.E.2d 57, 67 (Ind. Ct. App. 2005). Cessna argues that the Buhers abandoned the original waterline and installed a completely new line, thereby defeating their claim to the easement. However, the record supports the trial court's findings that the Buhers attempted to repair the original waterline section-by-section, trenching as close to the waterline as possible, installing new pipe, and connecting the new pipe to the original waterline. Ultimately, new pipe comprised the majority if not all of the waterline connecting the Buhers' residence to the public utility. The Buhers used reasonable efforts to repair the waterline. The record supports the finding that the Buhers did not abandon the original waterline.

Because the trial court correctly found that the Buhers acquired an easement, the trial court also correctly entered an order granting the Buhers' request for a permanent

injunction to prevent Cessna from interfering with their use of the easement. It is the duty of the owner of the servient estate to permit the owner of the dominant estate to enjoy his easement without interference. *See Harlan Bakeries Inc., v. Muncy*, 835 N.E.2d 1018, 1033 (Ind. Ct. App. 2005). The trial court did not err.

CONCLUSION

The trial court correctly found that the Buhers acquired an implied easement of necessity for the waterline across Cessna's property. The record supports each of the findings associated with the legal requirements to establish an implied easement of necessity. Further, the trial court correctly granted the Buhers' request for permanent injunction.

Affirmed.

CRONE, J., and ROBB, J., concur.